No. 6007

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. A. HAMMER, a minor, by his Guardian ad Litem, I. R. Hammer,

Defendant in Error,

vs.

MONTGOMERY WARD & COMPANY, a corporation,

Plaintiff in Error.

BRIEF OF PLAINTIFF IN ERROR

Appeal to the United States Circuit Court of Appeals for the Ninth Circuit

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STATEMENT OF CASE

This action was brought by the Guardian of R. A. Hammer, plaintiff, for the purpose of recovering damages for personal injuries from Montgomery Ward & Company, the employer of the plaintiff at the time of the accident.

In the store room and warehouse of Montgomery Ward, there were long sections of racks known as pit racks, which racks were about six feet high and made in sections of from sixteen to twenty feet long and

when said sections were put end to end and joined together made a complete line or section of about sixty feet. Each of the sections sixteen to twenty feet long were divided into smaller compartments known as pits which were about three feet wide and six feet high, the bottom resting on the concrete floor of the room where the racks were located. A shelf was placed in the center of the rack about three feet from the floor and another shelf or covering was placed on top of each pit so that merchandise might be piled on top of the racks. Merchandise ordinarily speaking was placed in the lower section of the pit rack, other merchandise was placed on the shelf three feet from the floor and other kinds of merchandise can be piled on top of the pit rack, the top being six feet from the floor.

It is rather hard to describe the pit racks to the Court so as to give an accurate understanding of the situation but the Court will get a better knowledge of the condition from photographs attached to the transcript and also from a model which was introduced in evidence, which while inaccurate, more or less gives a general idea of the construction.

In the complaint in this case it is charged that the plaintiff was ordered by one of the foremen of the defendant to go upon the pit rack to remove some goods therefrom and in Paragraph X of the complaint it was charged:

[Tr. page 6]

"That said defendant was careless and negligent in that it did not exercise reasonable care in furnishing to this plaintiff who was employed, a safe place to work and failed and neglected to use any precaution, care or device for the purpose of holding said loose floor upon which the plaintiff was working in place and carelessly and negligently ordered and permitted the plaintiff to work upon said loose flooring without in any manner making the same safe or secure. * * *"

(An allegation of negligence under the Common Law.)

In Paragraph XI of the complaint it is stated:

[Tr. page 7]

"That the defendant by the use of ordinary or any care could have made said false flooring or lattice board work upon which the plaintiff was working safe and secure by fastening the same with hooks, nails, or screws to the side of the pit rack or to the joists upon which the top rested or by bracing the easterly and westerly walls of said pit racks so that they would not bulge or spread apart by placing a brace across the same or by placing a wider joist at the top and along the inner sides of said pit racks upon which said boards

when said sections were put end to end and joined together made a complete line or section of about sixty feet. Each of the sections sixteen to twenty feet long were divided into smaller compartments known as pits which were about three feet wide and six feet high, the bottom resting on the concrete floor of the room where the racks were located. A shelf was placed in the center of the rack about three feet from the floor and another shelf or covering was placed on top of each pit so that merchandise might be piled on top of the racks. Merchandise ordinarily speaking was placed in the lower section of the pit rack, other merchandise was placed on the shelf three feet from the floor and other kinds of merchandise can be piled on top of the pit rack, the top being six feet from the floor.

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rested; that either or any or all of said methods, devices and precautions would have in no manner lessened the efficiency or use of the structure for which it was used nor in any manner interfered with the operation of the defendant in carrying out its said business but that the defendant carelessly and negligently and wantonly failed, refused and neglected to use any of said methods or any other method or device to hold said loose flooring in place so as to prevent them from falling. * * *"

Under the above allegations it was claimed by the defendant that this was an action brought on the Common Law theory and not under the Employers' Liability Law of Oregon, in which event the defendant would be allowed the defenses of contributory negligence and assumed risk and also the defense set up in the answer as to the degree of care necessary, which is reasonable care, where the place in which plaintiff was hurt was in the process of construction.

In Paragraph IX of said complaint it is alleged:

[Tr. page 6]

"That it was the duty of the defendant to use every device, care and precaution which was practical for it to use for the protection and safety of the life and limb of its employees and particularly this plaintiff, limited only by the necessity of pre-

serving the efficiency of the structure upon which the plaintiff was working and without regard to additional cost of suitable material or safety appliances and devices."

This latter might be construed as possibly tending to bring the action under the Employers' Liability Law of Oregon or in other words that the plaintiff was seeking recovery *first* under the Common Law, or *second,* if the facts justified it in the opinion of the jury to recover under the Employers' Liability Law.

These two rights of recovery were not set up as separate causes of action but were alleged in separate paragraphs and defendant in error did not file a motion to have the same pleaded as separate causes of action.

There is only one question raised by this appeal, although there are a number of specifications of error but the various specifications of error all refer to one thing and the one real question raised.

It is contended by the plaintiff in error that under the law of Oregon the question as to whether or not the injured is to recover under the Common Law theory or under the Employers' Liability Law should be left to the jury with appropriate instructions, or in other words that if the jury find that the place where the claimant was injured was not a dangerous place within

the language of the statute, then the Common Law theory would apply and the employer would be entitled to all of the Common Law defenses, and in this case contributoory negligence, assumed risk and the defenses set up in the answer that the place where the claimant was injured was under process of construction, which would give one rule of liability as to the employer; on the other hand if the jury should find after listening to the evidence that the place was one of danger within the terms of the statute, then the jury should be instructed as to the rules of liability under the Employers' Liability Law, and be instructed accordingly, or in other words, leaving to the jury under appropriate instructions to say whether the place where the claimant was injured was or was not one contemplated by the Employers' Liability Law and the jury should be instructed in the alternative.

In this case the Court ruled as a matter of law that this action was brought under the Employers' Liability Law and plaintiff in error claims that it was wrongfully deprived of the Common Law defenses providing the jury should believe after listening to the evidence that the place where the claimant was injured was not one involving risk or danger under the terms of the Employers' Liability Law.

The only question therefore raised by the defendant is as to whether or not the Court should have instructed

the jury in the alternative, first as to the Common Law liability, and second, the liability under the Employers' Liability Act leaving the jury to decide whether the conditions surrounding this accident and the place where the plaintiff was working was one involving risk or danger under the Employers' Liability Law.

SPECIFICATIONS OF ERROR

I.

The Court erred in its rulings and in holding and instructing that the cause of action was one under the Employers' Liability Law and not under the Common Law rules of liability in force in the State of Oregon at the time of the accident.

II.

The Court erred in instructing the jury in this action that the said action was brought under the Employers' Liability Law of Oregon and not upon the Common Law theory.

III.

The Court erred in giving the following instruction to the jury:

[Tr. page 57]

"This is an action brought under the Oregon State Employers' Liability Act, which provides

that all owners, contractors or sub-contractors, or other persons having charge of or responsible for any work involving risk or danger to the employee or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure or other apparatus or device, and without regard to the addtional cost of suitable materials or special appliances, or devices."

IV.

The Court erred in giving the following instruction to the jury:

[Tr. page 61]

"Contributory negligence does not constitute a defense to this action, but if established it must be taken into consideration by you in fixing the amount of the damages, if any. If you find by a preponderance of the evidence that the plaintiff was guilty of contributory negligence which was one of the proximate causes of the accident, then if you find for the plaintiff on the issues raised by the complaint, you will determine in what degree the respective negligence of the plaintiff and defendant contributed to the accident; and in so doing, if you find that the negligence, if any, of the plaintiff contributed to or caused the accident to

the extent of one-third of the entire negligence then plaintiff's damages should be decreased by one-third; if to the extent of one-half, then his damages should be reduced one-half. In other words, you should apportion the damages to the respective negligence, if any, of the plaintiff and defendant."

V.

The Court erred in failing to give an instruction to the jury as requested by the plaintiff in error which is as follows, to-wit:

[Tr. page 70]

"There is in the State of Oregon a law known as the Employers' Liability Law which is generally to the effect that all owners or persons engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of machinery or in the transmission of electricity, shall use certain care and said law states that all owners or other persons having charge of or responsible for any work involving a risk or danger to the employees or the public shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or de-

vice and without regard to the additional cost of suitable material or safety appliances and devices."

VI.

The Court erred in failing to give an instruction to the jury as requested by the plaintiff in error which is as follows, to-wit:

[Tr. page 71]

"It becomes a question of fact in this case which you will have to determine from the evidence which you have heard whether or not the kind of work that was being carried out at the time of the accident involved a risk or danger embraced within the Employers' Liability Act and before you will be authorized to apply the rules with regard to what would constitute negligence under the expressed provisions of the Employers' Liability Law."

VII.

The Court erred in failing to give an instruction to the jury as requested by the plaintiff in error which is as follows, to-wit:

[Tr. page 72]

"I instruct you in the event that you do find from a preponderance of the evidence that the work in question did not involve a risk or danger under the provisions of said Employers' Liability

Law, then in that event your deliberations and findings will be governed by the following rules of the common law which are as follows:"

VIII.

The Court erred in failing to give an instruction to the jury as requested by the plaintiff in error which is as follows, to-wit:

[Tr. page 72]

"In this case also the defendant has pleaded contributory negligence. Contributory negligence consists of such acts or omissions on the part of the person injured as would amount to the want of ordinary care on his part and if the plaintiff in this case was guilty of negligence causing or contributing to his injury then he should be held by you to have been guilty of contributory negligence."

VIII-A

The Court erred in failing to give an instruction to the jury as requested by the plaintiff in error which is an follows, to-wit:

[Tr page 73]

"I instruct you in this case that if the plaintiff was guilty of contributory negligence he may not recover and the rule is also that if you should find

in this case that both parties were guilty of negligence, that is both the plaintiff and defendant, then the plaintiff may not recover."

IX.

The Court erred in failing to give an instruction to the jury as requested by the plaintiff in error which is as follows, to-wit:

[Tr page 73]

"An employee assumes the ordinary risks and dangers of his employment in which he voluntarily engages to the extent those risks are known to him or in the exercise of reasonable care upon his part should have been known and where work is carried on and conducted in a way fully known to the employee and the employee continues to work in and about said place without objection he assumes the risks incident to the way and manner in which the business is conducted although a safer method could have been adopted."

X.

The Court erred in failing to give an instruction to the jury as requested by the plaintiff in error which is as follows, to-wit:

[Tr. page 74]

"If in this case you should find that this accident did come under the Employers' Liability Law

as I have described it above, then the contributory negligence of the plaintiff as I have defined the same to you in these instructions is not an absolute bar to the right of recovery of the plaintiff but if you should find that the plaintiff is entitled to recover damages in this case and that the plaintiff himself was guilty of some negligence contributing to the injury then in assessing any damages that the plaintiff has suffered as a result of this accident you should take into consideration the plaintiff's own negligence in fixing the amount of damages."

XI.

The Court erred in failing to give an instruction to the jury as requested by the plaintiff in error which is as follows, to-wit:

[Tr. page 74]

"It becomes a question of fact in this case, gentlemen of the jury, which you will have to determine from the evidence, whether or not it has been shown that the work engaged in by the defendant company was dangerous work, before you would be authorized to apply the rule with regard to what would constitute negligence under this express provision of the law to the case which you are trying. If you find that the same constitutes dangerous work, then the express provision of the

law would be applicable, in so far as the evidence disclosed a compliance therewith or a failure to comply therewith upon the part of the defendant. And it also is a question of fact as to whether or not the work which is disclosed by the evidence to have been conducted by the defendant in this case involved a risk or danger to the employees, before you would be justified in applying to this case the rule with regard to what constitutes negligence in cases where there is an express provision of the law, and the express provision of the law to which I have called your attention, in determining whether or not the defendant was negligent, and in case only that you find that the work involved risk or danger to the employees or the public, would you be justified in applying this express provision of the law."

These Specifications of Error may really be divided into two groups: The first, whether or not the Court should have arbitrarily stated that this action was brought and should be tried solely on the theory of the application of the Oregon State Employers' Liability Act; or second, as to whether or not the instructions should not have been given in the alternative, that is, the jury instructed as to the rule of liability if it found that this was under the Employers' Liability Law or on the other hand the rule under the common law if it was found that the Employers' Liability Law did not

apply or that the place of accident was not one of danger. All of these specifications may be treated as raising only one real question.

ARGUMENT

As stated hereinabove, in Paragraph X of the complaint, it is stated:

It was alleged in Paragraph X of the complaint:

[Tr. page 6, par. 10]

"That the defendant was careless and negligent in that it did not exercise reasonable care in furnishing to the plaintiff who was employed, a reasonably safe place to work."

In Paragraph XI it is alleged that:

[Tr. page 7, par. 11]

"* * * the defendant carelessly and negligently and wantonly failed, refused and neglected to use any of said methods or any other method or device to hold said loose floorings in place so as to prevent them from falling."

The above surely shows an attempt to plead a case of negligence under the Common Law or that is, a right to recover for want of reasonable care in which event in the State of Oregon the plaintiff is entitled

to the Common Law defenses, contributory negligence, assumed risk, and also to have applied the degree of care necessary where the apparatus, device or structure is in the process of construction.

In Paragraph IX of the complaint it is alleged that it was the duty of the defendant:

[Tr. page 6, par. 9]

> "* * * to use every device, care and precaution which was practicable for it to use for the protection and safety of life and limb of its employees and particularly this plaintiff, limited only by the necessity of preserving the efficiency of the structure upon which the plaintiff was working and without regard to additional cost of suitable material or safety appliances or devices."

This, however, may be construed as an attempt to plead a cause of action under the Employers' Liability Law, or in other words, the claimant has really by the complaint sought to recover under the Common Law theory for the reason that the structure about which the plaintiff was working was not such a one as is contemplated by the Employers' Liability Law but on the other hand if the facts warranted it plaintiff might recover under the Employers' Liability Law. In other words, the pleading was apparently intended to be double barrelled so as to recover under whatever theory

the jury might decide as to the fact of the place of accident being a place of danger under the Employers' Liability Law or not.

Section 6785 of the Oregon Code which is the Employers Liability Law applies to all owners having to do with the construction or repairing, or alteration of any building or structure, but the last part of said section is the only portion that has to do with the question here presented.

The following is a complete copy of said section:

"Sec. 6785. CARE REQUIRED OF OWNERS, CONTRACTORS, ETC., IN WORK INVOLVING RISK OR DANGER.

All owners, contractors, sub-contractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to

bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than 20 feet from the ground or floor shall be secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be inclosed, and all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employes of the owner, contractor or sub-contractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or

supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent, and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock and generally all owners, contractors or sub-contractors and other persons having charge of or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure, machine or other apparatus or device and without regard to the additional cost of suitable material or safety appliances or devices."

At the trial of this case and during the instructions the Court held that this was an action under the Oregon State Employers' Liability Act, and so instructed the jury.

"This is an action brought under the Oregon State Employers' Liability Act, which provides that all owners, contractors or sub-contractors, or other persons having charge of or responsible for any work involving risk or danger to the employee

or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure or other apparatus or device, and without regard to the additional cost of suitable materials or special appliances or devices."

[Tr. page 57]

The Court did not leave it to the jury to decide whether or not this structure described in the evidence was one contemplated by the Liability Law of Oregon.

This appellant claims that the Court should have left to the jury the decision of the question as to whether or not this particular set of racks or shelves about which the plaintiff was working was a structure involving a danger or risk to the employees under said act.

In ruling as a matter of law that under the facts and pleadings the Employers' Liability Law of Oregon governed, the plaintiff in error was deprived of its common law defenses, contributory negligence, assumes risk and the rules as to the degree of care applicable to structures in process of construction, which defenses would have been complete under the common law had the jury found as a matter of fact that the structure where the plaintiff was working was not such a one as was contemplated by the Oregon Employers' Liability Law.

The evidence in this case clearly shows that the structure was simple and could be easily understood and appreciated by anyone even from a casual observation; there was no machinery in connection with this structure at all and at the time of the accident it is entirely clear that the said structure was in process of erection and not completed, although the plaintiff claims that if the structure was not completed he had no knowledge thereof. There were questions of fact involved here which should have been left to the jury under appropriate instructions and not arbitrarily decided by the Court.

As we view the law in Oregon there is no question in cases of this kind but that it is necessary for the Court to state to the jury the Common Law Rule of liability and the defenses available to the defendant thereunder and then the rule under the Liability Law and the jury then is to apply the particular law according to the facts found.

Schaller v. Pacific Brick Co., 70 Ore. 557:

In this action the plaintiff was an operator of a dry press brick machine and it was charged that the employer failed to keep the brick press machine in repair and running order; that it was defective, etc. The Court gave an instruction which was approved and we quote from that instruction from page 564:

"* * * It becomes a question of fact in this case, gentlemen of the jury, which you will have to determine from the evidence, whether or not it has been shown that the machinery employed by the defendant company was dangerous machinery, before you would be authorized to apply the rule with regard to what would constitute negligence under this express provision of the law to the case which you are trying. If you find that the same constitutes dangerous machinery, then the express provision of the law would be applicable, in so far as the evidence disclosed a compliance therewith or a failure to comply therewith upon the part of the defendant. And it is also a question of fact as to whether or not the work which is disclosed by the evidence to have been conducted by the defendant in this case involved a risk or danger to the employees, before you would be justified in applying to this case the rule with regard to what constitutes negligence in cases where there is an express provision of the law, and the express provision of the law to which I have called your attention, in determining whether or not the defendant was negligent, and in case only that you find that the work involved risk or danger to the employees or the public, would you be justified in applying this express provision of the law."

Hoag v. Washington-Oregon Corp., 75 Ore. 588:

This was an action for damages brought by a lineman against the defendant and the negligence charged was that the current of electricity was turned on the wires without notice to the employee and he was therefore injured. The question was raised as to the Employers' Liability Law and the Court said:

Pages 602-603:

> "The case presented by the pleadings involved a double aspect charging matters upon which a recovery might have been had either at common law or under the Employers' Liability Act, and the defendant, without demurring, moving to make more definite and certain, or to elect, promptly answered, denying all allegations of negligence and pleading assumption of risk and contributory negligence. The testimony went in with few objections on either side, and it was only when requests for instructions were refused or when objections to instructions given were excepted to that the question as to the double aspect of the case was raised. After a careful examination of the authorities, including Schulte v. Pacific Paper Co., 67 Ore. 334 (135 Pac. 527, 136 Pac. 5), and our former opinion in the case at bar, we have arrived at the conclusion

> that, under the pleadings and evidence in this case, it was not error for the court to instruct both as to the liability of the defendant at common law and under the statute, and to say to the jury that, if the acts showed a liability or lack of liability, as tested by the whole law on the subject, they should render a verdict consonant with the law considered as a whole; and, further, that if facts showed a breach of the employers' liability statute, the defenses of contributory negligence and assumption of risk should be eliminated."

It will be noticed in this case that the pleadings were of a double aspect charging a liability under the Employers' Liability Law and also under the Common Law. No demurrer was interposed or motion made for election and as quoted above the Court says it was proper to charge the jury under both phases of the case.

Wolsiffer v. Bechill, 76 Ore. 516:

This was an action for damages where the plaintiff was injured while doing some grading and it was claimed that the employer could have made the place more safe by the use of a safety rail or some other contrivance.

At page 526 the Court said:

"Whether the work involved a risk or danger to employees or the public, and whether it was practicable to use the device mentioned in the pleadings for the safety of those engaged in the service, are questions of fact put in issue by the pleadings to be determined by the jury. By his peremptory instruction that the case comes under the Employers' Liability Act, on the ground that the fill was a structure, the trial judge to all intents and purposes took from the jury the right to decide these issues of fact. *Under the pleadings here, the only allegation of fact bringing the case within the terms of the act is the disputed one of whether or not the work involved risk or danger to the employees. It was the duty of the presiding judge to submit this question of fact to the jury; whereas, in very truth, he practically decided it himself under the instruction quoted. While we hold that a cause of action is stated under the statute mentioned, yet the traversed averments of fact must be left to the decision of the jury.*"

Yovovich v. Falls City Lumber Co., 76 Ore. 585:

This was an action where an employee was at work in the logging camp of the defendant as a "bucker," his duty being that of falling trees.

This action was apparently brought under the Employers' Liability Law which was made an issue. The Court stated:

Page 592:

> "4-6. The main question is whether the evidence in this case brings it within the statute. The condition of the trees and the manner of conducting the work were fully explained to the jury by the evidence, and it was for it to determine, under all the facts and circumstances, whether every practicable device and care was used by the defendant."

Mackay v. Commission of Port of Toledo, 77 Ore. 611:

This was an action brought by plaintiff against the Port of Toledo for personal injuries and it was claimed that the plaintiff was employed about a dredge and in work involving risk or danger and while so employed was injured and that the defendant was negligent in that it failed to furnish proper equipment, ladders, etc., for the men. This action was apparently brought under the Employers' Liability Law of the State of Oregon but even in such a case the matter being an issue as to whether the work was of the kind and character contemplated by the Employers' Liability Law, it was held that the question must be left to the jury. The Court said at page 616:

"2. The question as to whether or not the work involved a risk or danger is one of fact, to be determined by the jury, rather than a question of law, and we are not at liberty to disturb their finding thereon."

Wheeler v. Nehalem Timber Co., 79 Ore. 507:

This was an action brought by the plaintiff against the defendant for personal injuries where the plaintiff was injured in logging operations of the defendant and it was there held (page 510):

"1, 2. The operation of a logging camp in Oregon usually involves such risk and danger to the employees engaged in the business that the court could not say, as a matter of law, that the cause of action stated in the complaint did not come within the provisions of the Employers' Liability Act, and, this being so, the jury were entitled, under proper instructions, to determine the matter. If they concluded the action came within such enactment, the separate defenses of assumption of risk, contributory negligence, and carelessness of fellow-servants, as set forth in the answer herein, would be eliminated: Laws Or. 1911, c. 3; Blair v. Western Cedar Co., 75 Or. 276 (146 Pac. 480); Yovovich v. Falls City Lumber Co., 76 Or. 585 (149 Pac. 941, 943.)"

Poullos v. Grove, 84 Ore. 106:

This was an action by plaintiff against the defendant where plaintiff was compelled to go upon a platform or second story about fifteen feet above the first floor so as to pitch feed down to the racks and mangers below and that while the plaintiff was engaged in this work and on the said platform he fell into a hole or pit-fall that had been left at the place where he was working and which he knew nothing about, the same question was raised, practically as in the case at bar, and it was there in issue as in this case as to whether or not the case came under the Employers' Liability or not.

The Court in its opinion affirmed the other cases cited and stated (page 114):

> "As stated by Mr. Justice Benson in Mackay v. Commission of Port of Toledo, 77 Or. 611 (152 Pac. 250):
>
> 'The question as to whether or not the work involved a risk or danger is one of fact, to be determined by the jury, rather than a question of law'."

Rorvik v. North Pac. Lumber Co., 99 Ore. 58:

This was a case of a man falling from a dock in the Willamette River and on account of said fall was injured and died.

The question of Employers' Liability Law of Oregon was an issue and the Court held that the question should be left to the jury to determine as a matter of fact under proper instructions, whether it was under the Employers' Liability Law or not (page 71):

> "The paragraphs quoted in the statement give in great detail the manner in which the work of loading was carried on; point out its defects and omissions, and how they might have been remedied or avoided; and the abstract shows no demurrer or objection to the pleading before trial, and the case was tried apparently upon the theory that it was sufficient. Under the circumstances we think the pleading was sufficient. This being the case, the question as to whether the work was hazardous or in fact involved risk or danger, became a question for the jury; Wolsiffer v. Bechill, 76 Or. 516 (146 Pac. 513, 149 Pac. 533); Yovovich v. Falls City Lbr. Co., 76 Ore. 585 (149 Pac. 941.)

Bottig v. Polsky, 101 Ore. 530:

This was a case where the plaintiff was injured while loading barrels in a box car and while doing this work the plaintiff was injured and in the complaint charged various negligent acts on the part of the employer, to-wit: that the employer was always in a hurry; it was dark; insufficient lights; the barrels were oily and greasy, etc.

The Court said at page 549:

> "The question as to whether or not a work involves a risk or danger is generally a question of fact to be decided by a jury: Mackay v. Commission of the Port of Toledo, 77 Or. 611, 616 (152 Pac. 250); and, hence, unless as in O'Neill v. Odd Fellows' Home, 89 Or. 382, (174 Pac. 148), the court can say as a matter of law that the work *does not involve a risk or danger,* the question of danger should be submitted to the jury."

In the quotation last above made it refers to the case of O'Neill v. Odd Fellows' Home, 89 Ore. 382, where it seems to be held at page 390 that the Court may hold that a case does *not* come under the Employers' Liability Law but we do not know of any case where it is held as a matter of law by the Court that a case is under the Employers' Liability Law, where the allegations in the complaint tending to bring the action under the Employers' Liability Law are denied by the defendant and made an issue as in the case at bar.

Stanfield v. Fletcher, 114 Ore. 531:

This was an action brought under the Employers' Liability Law and involved the operating of a gasoline engine used for propelling a wood saw and it was

claimed that there were no guards or protection of any kind around the machine.

This case probably may be cited by the defendant in error but certainly is not in point for the reason that the action was brought under the Employers' Liability Law. It seems to have been conceded that the action was under the Employers' Liability Law and there was no plea of contributory negligence in the answer.

It was held in that case that instructions defining the liability under the Common Law would be error and we think the Court properly so held particularly as the plaintiff was injured around dangerous machinery clearly within the terms of the statute and the action was brought upon the theory *only* of the Employers' Liability Law and that position not contested and contributory negligence was not pleaded.

McCauley v. Steamship "Willamette" et al, 109 Ore. 131:

This was a case where a longshoreman was injured while loading lumber from a dock to a ship and one of the questions raised was as to whether or not the case was governed by the Employers' Liability Act and the Court said at page 144:

> "4. The allegations upon which the plaintiff based his claim that the work which he was doing was one involving a risk or danger were denied by

the defendants. An issue was therefore raised between the plaintiff and the defendants as to whether or not the work was one involving risk or danger within the meaning of the Employers' Liability Act. The Court did not submit that issue to the jury; but the Court assumed that the Employers' Liability Act governed the defendants and in substance told the jury that it was the duty of the defendants to comply with the act and that if the defendants failed to exercise the care required by the statute they were liable. Cases may occur where the Court can say as a matter of law that the work did not involve a risk or danger within the meaning of the statute; O'Neill v. Odd Fellows' Home, 89 Or. 382 (174 Pac. 148); and undoubtedly many injuries may occur where the Court can say as a matter of law, and accordingly ought to instruct the jury, that the work in which the injured person was engaged was one involving a risk or danger within the meaning of the 'and generally' clause of the Employers' Liability Act; but in the instant case the question was one which ought to have been submitted to the jury for decision: Wolsiffer v. Bechill, 76 Or. 516, 526 (146 Pac. 513, 149 Pac. 533); Yovovich v. Falls City Lumber Co., 76 Or. 585, 592 (149 Pac. 941); Mackay v. Commission of Port of Toledo, 77 Or. 611, 616 (152 Pac. 250); Wheeler v. Nehalem Timber Co., 79 Or. 506, 510

(155 Pac. 1188); Poullos v. Grove, 84 Or. 106, 113 (164 Pac. 562); Rorvik v. North Pacific Lumber Co., 99 Or. 58, 71 (190 Pac. 331, 195 Pac. 163). Therefore, the judgment must be reversed, among other reasons, because the court assumed as a matter of law that the Employers' Liability Act applied."

In this case the writer of this brief does not think that the place where the plaintiff was injured was one involving risk or danger within the terms of the statute. The racks about which the plaintiff was working were simple in construction, able to be seen, only six feet in height and consisted of bins or racks for the storing of small merchandise. Everything in connection with the appliance was open and visible and was no more intricate than the ordinary step ladder or counter and shelving in a store. The plaintiff was a man of experience, had worked several summers as a carpenter and there was no machinery of any kind or description involved in the situation at the time of the accident. We think it was highly improper for the Court to say to the jury all during the case and in the instructions that this was a place of danger under the State Employers' Liability Act.

When the complaint is framed so as to recover on a common law theory and also on the theory of the violation of a statute and these allegations are denied

and an issue is raised, it is then a question for the jury and the Court should instruct the jury in the alternative, that is, both as to the liability under the Common Law and the liability under the statute, and then leave it to the jury to say which law is to be applied or in other words to say whether or not the work was one involving risk or danger under the Employers' Liability Statute.

Under the laws of Oregon the defense of contributory negligence and assumption of risk are eliminated where the Employers' Liability Statute is applied.

Hoag v. Washington-Oregon Corp., 75 Ore. 588:

Pages 602-603:

"The case presented by the pleadings involved a double aspect charging matters upon which a recovery might have been had either at common law or under the Employers' Liability Act, and the defendant, without demurring, moving to make more definite and certain, or to elect, promptly answered, denying all allegations of negligence and pleading assumption of risk and contributory negligence. The testimony went in with few objections on either side, and it was only when requests for instructions were refused or when objections to instructions given were excepted to that the question

as to the double aspect of the case was raised. After a careful examination of the authorities, including Schulte v. Pacific Paper Co., 67 Or. 334 (135 Pac. 527, 136 Pac. 5), and our former opinion in the case at bar, we have arrived at the conclusion that, under the pleadings and evidence in this case, it was not error for the Court to instruct both as to the liability of the defendant at common law and under the statute, and to say to the jury that, if the acts showed a liability or lack of liability, as tested by the whole law on the subject, they should render a verdict consonant with the law considered as a whole; and, further, that if facts showed a breach of the employers' liability statute, the defenses of contributory negligence and assumption of risk should be eliminated."

CONTRIBUTORY NEGLIGENCE UNDER THE COMMON LAW IN THE STATE OF OREGON IS A COMPLETE DEFENSE.

Hurst v. Burnside, 12 Ore. 520 at 531:

> "It is a general principle that a person cannot recover for an injury occasioned by the negligence of another unless he, himself, is without negligence contributing to the injury of which he complains. If, therefore, you find from the evidence that the negligence, carelessness or want of care on the part of the plaintiff contributed to the injury of which he complains, he cannot recover in this action and your verdict must be for the defendant."

This requested instruction was approved by the Supreme Court.

IN OREGON UNDER THE COMMON LAW, ASSUMED RISK IS A DEFENSE.

Stager v. Troy Laundry Co., 38 Ore. 480, at 485.

> "A servant is understood to assume the ordinary risks incident to the particular service in which

he voluntarily engages, to the extent those risks are known to him at the time of his employment, or should be readily discernible to a person of his age and capacity in the exercise of ordinary care and prudence. * * * If he voluntarily continues, however, without complaint or objection, after knowledge or notice of their existence, under conditions by which he is chargeable with an appreciation of the danger, and where ordinary prudence would require of him a different course, he is held also to take upon himself the responsibility entailed by the risk he continues to incur; and this applies to perils engendered by defects in appliances due to the master's fault:"

UNDER THE COMMON LAW IN OREGON A MASTER DOES NOT HAVE TO KEEP HIS MACHINERY AND APPLIANCES IN AS GOOD CONDITION WHERE THE SAME ARE IN PROCESS OF CONSTRUCTION AS HE WOULD IF THE APPLIANCES OR PLACE WHERE SERVANT HAS TO WORK IS IN A COMPLETED STATE.

Carlsen v. Oregon Short Line, 21 Ore. 450 at page 452.

> "Where a servant is employed to put a thing in safe and suitable condition for use, it would be unreasonable and inconsistent to require the master to have it in safe condition and good repair for the purpose of such employment. The effect of such a rule would be to render the master liable as an insurer of the safety of his servant and entirely abrogate the well settled doctrine that the servant assumes the risks and perils incident to his employment."

It has been claimed in the Assignments of Error that the plaintiff in error was entitled to have the jury instructed upon contributory negligence and as to the liability under it.

Plaintiff in error requested the Court to give an instruction as follows:

[Tr. page 72]

> "In this case also the defendant has pleaded contributory negligence. Contributory negligence consists of such acts or omissions on the part of the person injured as would amount to the want of ordinary care on his part and if the plaintiff in this case was guilty of negligence causing or contributing to his injury then he should be held by you to have been guilty of contributory negligence."

The Court was asked as is shown by the assignments of error and bill of exceptions to give appellant's requested instruction on assumed risk.

It is true that the Court did give the instruction to the jury of contributory negligence last above quoted but the Court nullified this instruction by following it up with language to the effect that under no circumstances would this rule as to contributory negligence apply for the reason that the Court was arbitrarily and as a matter of law applying the Employers' Liability Law and not applying the Common Law or instructing the jury in the alternative.

This instruction relative to contributory negligence was preceded by the instruction that:

> "This is an action brought under the Oregon State Employers' Liability Act."

and was followed by an instruction:

> "Contributory negligence does not constitute a defense in this action but if established it must be taken into consideration by you in fixing the amount of damages if any."

It will be noted therefore in the instructions that the Court never did give any instruction on the Common Law theory of the case and ruled as a matter of law that the Employers' Liability Law governed and that

contributory negligence was not a complete defense but might be taken into consideration in assessing damages and further that assumed risk was not a defense.

Therefore we feel that the Court was in error in ruling arbitrarily that this action was under the Employers' Liability Law; that the Employers' Liability Law was the only thing to be considered by the jury.

Respectfully submitted,

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